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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SUN CITY TAXPAYERS' ASSOCIATION,

Petitioner,

vs.

CITIZENS UTILITIES COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does the petitioner, a not-for-profit corporation[1] formed and operated to monitor and take legal action with respect to utility rates and charges for the benefit of all of the property owners and residents of a community, and which intervened for many years in administrative proceedings before the state utilities regulator to set and increase such rates and charges, have standing to bring a RICO action against a public utility for defrauding the state utilities regulator and itself as intervenor in the rate proceedings thereby causing the corporation's constituents to pay materially higher charges than they would have if the fraud had not been perpetrated?

2. Where a public utility commits and conceals a fraud upon its state regulators and upon intervenors in the state administrative proceedings in order to achieve rates of return materially higher than those to which it would be otherwise entitled, and where the administrative proceedings cannot be re-opened because of a regulatory rule against retroactive rate making so that the utility would otherwise retain its illegally achieved rates, does the filed rate doctrine preclude a ratepayer or his or her representative (such as the petitioner) from suing the utility under RICO?

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[1]The petitioner has no parent or subsidiaries.

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IN THE SUPREME COURT OF THE
UNITED STATES

October Term 1994

SUN CITY TAXPAYERS' ASSOCIATION,
Petitioners

v.

CITIZENS UTILITIES COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Sun City Taxpayers' Association (hereinafter "SCTA"), respectfully petitions this Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit dated January 23, 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, decided January 23, 1995, has not yet been officially reported. It is reported at Westlaw as 1995 WL 24335. The opinion of the United States District Court is reported at 847 F. Supp. 281 (D.C. Conn. 1994). The opinions of the Court of Appeals for the Second Circuit and the District Court for Connecticut appear respectively in Appendix A and Appendix B hereto.

STATEMENT OF JURISDICTION

Jurisdiction is conferred upon the Court to review the judgment in question by way of certiorari by virtue of 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

This is a civil action arising under the Racketeer Influenced and Corruption Organization Act) (hereinafter "RICO"), 18 U.S.C. Section 1962 and 18 U.S.C. Section 1964(c).

18 U.S.C. Section 1962 reads as follows:

" § 1962. Prohibited activities

"(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

"(b) It shall be unlawful for any person through a pattern of racketeering activity or

through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

"(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

18 U.S.C. Section 1964(c) reads as follows:

"(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

SCTA is a not-for-profit corporation incorporated in Arizona, whose charter mandate is to "investigate, obtain data, study and determine the fairness and reasonableness of ... utility charges ... which may be, or proposed to be, either imposed, levied, assessed, charged, or contracted, by ... utilities ... affecting property owners or residents of Sun City [Arizona], and to take whatever legal action is deemed fair, reasonable and otherwise equitable". Under its charter, SCTA seeks "to provide equitable rate charges from all public utilities" and "to secure the best possible rates" for its constituents from public utilities. In the effectuation of these purposes SCTA has the right "to sue ... in all courts and all places in all matters and proceedings whatsoever." The remedial conduct of SCTA vis-a-vis utility charges benefits all property owners and residents of Sun City, whether or not they pay dues to SCTA.

Respondent (hereinafter "Citizens") is a Delaware corporation with its principal place of business in Stamford, Connecticut. Citizens owns all of the issued and outstanding shares of stock in Sun City Water Company and Sun City Sewer Company (hereinafter "Sun City subsidiaries"). The Sun City subsidiaries provide water and sewer and related utility services to the residents of Sun City, Arizona and have done so at all times relevant hereto. The Sun City subsidiaries were nominal parties only to the rate applications involved in this litigation; all activities pertaining to applications for the setting of rates for Sun City, Arizona and pertaining to the books and records of the Sun City subsidiaries were

under the direct and complete dominion and control of Citizens.

The complaint asserts that from 1968 to 1978 by means of a highly complex accounting fraud perpetrated by Citizens, through the vehicle of its Sun City subsidiaries, upon the Arizona Corporation Commission (hereinafter "the Commission") which regulates public utility rates in Arizona, Citizens procured substantial rate increases to which it was not lawfully entitled. By equally ingenious accounting legerdemain, Citizens managed to conceal this fraud from the Commission, SCTA and others. SCTA estimates that Citizens procured $65 million to which its Sun City subsidiaries were not lawfully entitled; these sums were paid upstream to Citizens as dividends. For many years SCTA intervened in utility rate proceedings commenced by the Sun City subsidiaries before the Commission. SCTA as intervenor, as well as the Commission as regulator, was misled by the concealment by Citizens of its fraudulent procurement of unlawful rates for its Sun City subsidiaries.

There is a general rule in public utility rate-making which prohibits retroactive rate-making or retroactive rate-base adjustments, even if the original proceeding was tainted by fraud, once the regulator's decision becomes final after all appeals. This rule of finality, which is recognized in Arizona, holds that, once the Commission approves a rate which becomes final, the Commission may not require reparations in order to retroactively determine a different rate as the result of a collateral attack. See *Mountain States Telephone & Telegraph Co. vs. Arizona Corporation Commission*, 124

Arizona 433 at 436 (App. 1979); *El Paso & S.W.R. Co. vs. Arizona Corporation Commission*, 51 F.2d 573 at 577 (D.C. Ariz. 1931).[2] Thus, if Citizens is not required to account judicially for its fraudulent misconduct, it will have irretrievably received significantly higher rates than those to which it was lawfully entitled, and the constituents represented by SCTA will be without a remedy for the substantial sums improperly extracted from them.

REASONS FOR ALLOWANCE OF THE WRIT

I

THIS COURT SHOULD NOT BAR THE USE OF ASSOCIATIONAL REPRESENTATION BECAUSE MONEY DAMAGES ARE SOUGHT.

The Court of Appeals construed this Court's decisions in *Warth v. Seldin*, 422 U.S. 490 (1975) and *Hunt vs. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977) to preclude the use of associational representation where money damages are sought. The Court of Appeals held that because each of Sun City's residents would have individualized damages based on his

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[2] At oral argument before the Second Circuit, Citizens' counsel acknowledged that the rule against retroactive rate making would bar the Commission from reopening the rate cases involved here even if Citizens had committed a fraud upon the Commission in the rate-making process.

or her utility bills, this Court would not permit associational representation. The Court of Appeals stated:

> "The complaint describes a ten-year period of RICO violations perpetrated through a complex accounting fraud scheme. Presumably, not all of SCTA's members today were living in Sun City during 1968-1978, and each resident's injuries during that period would differ depending upon the amount of utility services consumed and the uses to which those services were put. Consequently, the individual members would be required as parties if this lawsuit were allowed to proceed, and SCTA has no standing to proceed in their absence."

Neither *Warth v. Seldin*, *supra*, nor *Hunt vs. Washington State Apple Advertising Comm'n*, *supra*, was an action for money damages; each case sought equitable relief. However, by its holding below the Court of Appeals has effectively ruled out the use of associational representation in cases involving monetary damages, at least in the Second Circuit. As is noted below, other Courts of Appeals in other circuits disagree; SCTA urges this Court to definitively resolve the dispute by permitting associational representation in actions for money damages.

Associational representation by SCTA for its constituents, all of the property owners and residents of Sun City, makes eminent sense here. It is preferable to each of the 27,300 residents of Sun City suing individually, assuming that each could afford the expense and was willing to incur the stress and burdens of this

litigation; indeed, bringing actions such as this is among the very reasons SCTA exists, as provided in its charter. Moreover, associational representation is preferable to a class action; as was pointed out by SCTA in its brief to the Court of Appeals and in oral argument in the District Court, associational representation dispenses with all the issues as to the propriety of the class representative, the cumbersome requirements of communicating and dealing with the class, issues such as opting out of the class, and all of the peripheral issues which arise under Rule 23, and permits a more effective use of judicial time in dealing with the merits of the underlying action rather than procedural questions ancillary to those merits.

This Court has indicated its desire to liberalize standing for associations in *Hunt vs. Washington State Apple Advertising Comm'n, supra*, where a state agency was treated as the equivalent of a voluntary membership association such as SCTA, and the right of such an association to sue for its constituents was affirmed.[3]

Furthermore, other Courts of Appeal have held, contrary to the court below, that associational representation may be utilized in actions for money damages. In *Middlewest Motor Freight Bureau v. United States*, 525 F.2d 681 (8th Cir. 1975), the Court of Appeals

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[3] The state agency in *Hunt vs. Washington State Apple Advertising Comm'n, supra*, did not have members as such; rather, it represented its constituents, just as here SCTA represents all of the property owners and residents of Sun City who are the beneficiaries of its corporate purposes, whether or not they pay dues to SCTA.

for the Eighth Circuit permitted associations of shippers to seek monetary relief on behalf of members injured by the defendant motor freight carriers. *Middlewest Motor Freight* holds that an association may seek monetary damages on behalf of its members so long as some of its members have in fact suffered pecuniary injury. Contrary to the holding of the Second Circuit below, the Eighth Circuit in *Middlewest Motor Freight* did not require that each member have equal pecuniary damages or, in fact, that each member have damages at all. The Eighth Circuit in *Middlewest Motor Freight* did not hold that the fact that each member's damages are peculiar to that member made each member an indispensable party to the litigation; in fact, the opposite was held, i.e., the association was found to have standing to represent its members in an action for money damages so long as some of them had suffered economic harm. Moreover, the Tenth Circuit has also recently permitted associational representation in an action for money damages, *National Commission and Barter Association vs. Archer*, 31 F.3d 1521 (10th Cir. 1994) (a non-commercial, not-for-profit, voluntary political and educational association may maintain a *Bivens* action seeking both compensatory and punitive damages against various government officials).

See also the decision of the Second Circuit in *Standardbred Owners Ass'n v. Roosevelt Raceway Ass'n L.P.*, 985 F.2d 102 (2d Cir. 1993), holding that a membership association had standing to sue for itself and as a representative of others similarly situated, on a RICO claim for monetary damages. Like the Standardbred Owners Association, SCTA is here seeking under RICO monetary damages "for injuries that were a direct and

inevitable result of defendants' conduct and must have been anticipated by the defendants." Like the Standardbred Owners Association, SCTA should have standing to seek monetary damages on behalf of those injured who are represented by it; that claim is not derivative but direct.[4]

At the courts below, SCTA urged, and here urges again, that an effective use of judicial resources would permit associational representation as to liability and aggregate damages, and would then have a local court in Arizona determine the distribution of those damages on an application by the SCTA for such a determination. This is clearly an efficacious way of dealing with the distribution of damages. For purposes of this litigation, the determination of liability and a finding of aggregate monetary damages would not require individualized proof and thus, each individual constituent resident or property owner represented by SCTA would not be an indispensable party to this litigation.

In sum, there is no good policy reason for the Second Circuit's barring associational representation in an action for monetary damages; its determination is contrary not only to decisions in the Eighth and Tenth Circuits but

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[4]In fact, the language of the Court of Appeals in this case quoted at page 7 above would appear to apply equally to preclude a class action as it would an action brought by associational representation; clearly a class action would lie here (at least in the absence of the application of the filed rate doctrine discussed in Point II, below.)

to its own decision in *Standardbred Owners Assn, supra.* This Court's unequivocal approval of the Eighth Circuit's holding in *Middlewest Motor Freight, supra,* would provide the federal courts with an effective judicial tool in expediting complex litigation in which many parties have an economic stake.

II.

CONGRESS DID NOT INTEND TO HAVE THE FILED RATE DOCTRINE BAR A RICO ACTION AGAINST A REGULATED PUBLIC UTILITY, ESPECIALLY WHERE THE UTILITY DOES NOT WAIVE THE RULE AGAINST RETROACTIVE RATE-MAKING THUS ASSURING THAT IT WILL RETAIN THE FRUITS OF ITS MISCONDUCT.

The rule articulated by the Court of Appeals below is a virtual invitation to any business engaged in a regulated industry to commit fraud in the establishment of its rates. According to the narrow and pinched reading of RICO by the Court of Appeals, utilities would be subject only to suits brought by their regulator under RICO, but would be shielded from ratepayers seeking a private civil remedy. It is impossible to square this interpretation of RICO with the liberal and broad scope given that statute's remedial civil purposes by this Court in *Sedima S.P.R.L. vs. Imrex Co.*, 473 U.S. 479 at 499 (1985) and in *H.J.*

Inc.vs. Northwestern Bell Tel. Co., 492 U.S. 229 at 248-249 (1989).[5]

The decision of the Court of Appeals here is contrary to the intent of Congress in enacting RICO. Congress never intended to endorse fraud in the rate-making process or to shield wrongdoers from RICO's civil remedies. In fact, in *County of Suffolk v. Long Island Lighting Company*, 907 F.2d 1295 (2nd Cir. 1990) ("*LILCO*"), another panel of the Second Circuit microscopically examined RICO and explicitly held that RICO applies to fraudulent conduct in the rate-making process committed by state regulated utilities. *LILCO* unequivocally held that regulated public utilities are subject to the strictures of RICO, and stated that there is not even a remote suggestion in RICO that public utilities are exempt from its application. The court in *LILCO* noted examples where Congress expressly intended to remove public utilities from the ambit of statutes of otherwise general applicability and found no such intent in RICO. While the *LILCO* Court did not expressly deal with the filed rate doctrine, it did analyze the *Burford* abstention doctrine, the primary jurisdiction doctrine, and

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[5]In fact, under the application of the filed rate doctrine by the Second Circuit below, this Court could never have decided *H.J. Inc.*, *supra*, since that was an action by a ratepayer against a regulated utility. This Court permitted a RICO action by a ratepayer against a regulated public utility in *H.J. Inc.*, *supra*, notwithstanding the existence of the filed rate doctrine, with which this Court was familiar at the time *H.J. Inc.* was decided.

the agency expertise doctrine, and held that these doctrines - *all of which are rationally and intellectually coextensive with the filed rate doctrine* - do not bar RICO actions against regulated public utilities.

The Court below relied primarily on *Wegoland, Ltd. vs. NYNEX Corp.*, 27 F.3d 17 (2nd Cir. 1994), in holding that the filed rate doctrine bars a RICO action against a regulated public utility. *Wegoland* was decided after SCTA filed its briefs with the Second Circuit, but before oral argument below. *Wegoland* will eviscerate RICO. The application of the filed rate doctrine in *Wegoland, supra* has already been extended beyond public utilities to the insurance industry. *Fersco v. Empire Blue Cross/Blue Shield of N.Y.*, 93 Civ. 4226, 1994 WL 445730 (S.D.N.Y. 1994); *Minnihane v. Weissman, New York Law Journal*, December 20, 1994, pages 27-28, (Supreme Court, New York County, 1994). It is a short step to apply this rule to hospitals, proprietors of gaming casinos, taxicab companies, and other enterprises whose individual rates are set by regulatory authorities. Clearly Congress could not have intended to *sub silentio* emasculate RICO by excluding all regulated industries from its scope in connection with fraud in the rate-making process.

The filed rate doctrine developed under anti-trust laws long before RICO was contemplated, much less enacted. Not only was the filed rate doctrine created in a

pre-RICO context which ought not to apply to RICO,[6] but moreover it is well-established that anti-trust decisions, such as those on which the filed rate doctrine is based, do not provide a general framework for applying RICO or a precedential underpinning for interpreting that statute. See *Ritchie v. Carvel Corp.*, 714 F. Supp. 700, 705 (S.D.N.Y. 1989) ("Although Congress patterned Section 1964(c) on Section 4 of the Clayton Act there is no indication that Congress intended that implicit requirements of antitrust actions be impressed on civil RICO actions. Courts have consistently rejected the view that 'RICO should be viewed as an extension of antitrust law in all respects.'"); *Bennett v. Berg*, 685 F.2d 1053, 1059 (8th Cir. 1982) (Clayton Act requirement of 'competitive injury' should not be extended to RICO), *aff'd*, 710 F.2d 1361 (en banc), *cert. denied*, 464 U.S. 1008 (1983); *Schacht v. Brown*, 711 F.2d 1343, 1357-58 (7th Cir. 1983) (notion that objectives of RICO and antitrust laws are identical is not supported by legislative history), *cert. denied*, 464 U.S. 1002 (1983). See also, *HMK Corp. v. Walsey*, 637 F. Supp. 710, 717 (E.D. Va. 1986), *aff'd on other grounds*, 828 F.2d 1071 (4th Cir. 1987) (because "RICO differs greatly from federal antitrust, the need for exclusive federal jurisdiction

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[6] As the court noted in *LILCO*, RICO implicates special policy judgments made by Congress. In *LILCO* the policies inherent in RICO were held to be so significant that they could not be pre-empted by the *Burford* abstention doctrine, the primary jurisdiction doctrine or the agency expertise doctrine; these doctrines are virtually identical to the filed rate doctrine, which is simply another name for those rules held in *LILCO* not to preclude the application of RICO to state regulated utilities.

under the antitrust statutes cannot justify a similar result under RICO").

Moreover, there are material differences between this case and *Wegoland*. Among the strong policy reasons relied upon by the Second Circuit in *Wegoland* for its holding that there is no private right of action under RICO against a regulated public utility, is that "Individual ratepayers are unlikely to have any special knowledge of the alleged wrongdoing that would make it advantageous to have private enforcement through the RICO or antitrust provisions." SCTA is not merely an "individual ratepayer" who happens to be the plaintiff in a class action, as was the case in *Wegoland*. SCTA's very purpose is to act as an advocate for the residents and property owners of Sun City in monitoring and litigating public utility charges. Over many years SCTA has developed expertise in the utility rate-making process in the discharge of its corporate purposes. As a long-term intervener in the regulatory rate-making process, SCTA is a special type of plaintiff which bears no resemblance to the class-action plaintiff in *Wegoland*.

Another, more crucial, difference between this case and *Wegoland* is that in *Wegoland* the defendant expressly waived the rule against retroactive rate-making and retroactive rate-base adjustments, thereby consenting to be the subject of further administrative proceedings for

redress for its fraud.[7] In this case, Citizens has not agreed to such a waiver, and as a result, the general rule in public utility rate-making which prohibits retroactivity in rate-making or rate-base adjustments even if the original proceeding was tainted by fraud, bars seeking redress before the state utilities regulator. As a result of the waiver in *Wegoland* of the rule against retroactive rate-making, in that case each of the regulatory agencies involved had either already taken action to redress the damages incurred by the defrauded ratepayers, or were in the process of doing so; the district court opinion notes that "[p]roceedings in many different fora have occurred and are occurring." For example, the Federal Communications Commission filed proceedings against NYNEX for overcharges, and NYNEX entered into a consent decree in which it agreed to a reduction for interstate rates of $35,500,000. State regulatory agencies in Massachusetts and Vermont required New England Telephone to make excess profit adjustments in intrastate rates, and the utility volunteered to make such adjustments in Maine, New Hampshire, Rhode Island and Connecticut. No such relief has occurred here; because Citizens has not waived the rule against retroactive rate-making, unless the Second Circuit is reversed Citizens will retain the fruit of its fraud and its ratepayers will be without redress.

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[7]The waiver by the defendant in *Wegoland* of the rule against retroactive rate-making appears not in the Court of Appeals opinion, but in the District Court opinion, 806 F. Supp. 1112 (S.D.N.Y. 1992).

The Eighth Circuit in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485 (8th Cir. 1992), *cert. denied*, 112 S. Ct. 2306 (1992) ("*H.J. Inc. II*") on remand from this Court applied the filed rate doctrine to bar a RICO claim. However, it did so, and it expressly distinguished *LILCO*, only because in *H.J. Inc. II*, as was the case in *Wegoland*, the rate-payers already had received financial redress for the damages suffered because of the utility's fraud. In *H.J. Inc. II*, the Minnesota Public Utilities Commission had already reduced rate increases from $57,148,000 to $45,603,000. In addition, the State Attorney General brought a lawsuit against the utility (apparently similar to the present litigation, although there is no specific reference to RICO); and Northwestern Bell Telephone, instead of asserting the prohibition against retroactive rate-making, conceded the case by paying $32,000,000 to the rate-payers. Not only was this litigation-achieved redress the basis for the Eighth Circuit's decision in *H.J. Inc. II*, 954 F.2d at 491 and 493, it was the explicit basis on which the Eighth Circuit distinguished *LILCO*, stating: "[T]hus not only are damages available through the state administrative process, they have actually been received." 954 F.2d at 496.

Serious policy problems inhere in a broad preclusion of private rights of action against utilities under RICO, except by state regulators. For example, if there is a corrupt relationship between a utility and its regulator (as was the case in *H.J. Inc. vs. Northwestern Bell Tel. Co.*, *supra*) both sides have a clearly vested interest in avoiding such litigation. Even if the relationship is not corrupt or collusive, but simply the comfortable, cordial, non-adversarial relationship that often evolves between the

regulator and the regulated, actions against defrauding utilities often may not be brought or diligently enforced.

It is the ratepayers which have the ultimate economic stake in making certain that utility rates are fair and honestly set. To deprive them of a private right of action is not only inequitable; it is an invitation to fraud. That is not a policy which this Court should endorse. At the very least, if a utility wishes to invoke the filed rate doctrine to bar a RICO suit against it for fraud in the rate-making process, this Court should require the utility to waive the rule against retroactive rate-making and subject itself to administrative redress for its misconduct.

CONCLUSION

For the reasons set forth above, the Petitioner requests that a writ of certiorari to the United States Court of Appeals for the Second Circuit be issued in this case.

Dated: February 7, 1995

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APPENDIX A

OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 191—August Term, 1994

(Argued: September 9, 1994 Decided: January 23, 1995)

Docket No. 94-7223

SUN CITY TAXPAYERS' ASSOCIATION,

Plaintiff-Appellant,

—v.—

CITIZENS UTILITIES COMPANY,

Defendant-Appellee.

Before:

MESKILL, MAHONEY, and WALKER,

Circuit Judges.

Plaintiff-appellant Sun City Taxpayers' Association appeals from an order entered February 2, 1994 in the United States District Court for the District of Con-

necticut, Jose A. Cabranes, then-*Chief Judge*, that dismissed the Association's civil RICO claims premised upon alleged fraud by defendant-appellee Citizens Utilities Company in procuring excessive rates from the Arizona Corporation Commission.

Affirmed.

ELLIOT I. MILLER, Southport, Connecticut (Kleban & Samor, P.C., Southport, Connecticut, of counsel), *for Plaintiff-Appellant*.

JOSEPH E. MAIS, Phoenix, Arizona (Anthony L. Marks, Brown & Bain, P.A., Phoenix, Arizona, James F. Stapleton, Day, Berry & Howard, Stamford, Connecticut, of counsel), *for Defendant-Appellee*.

MAHONEY, *Circuit Judge*:

Plaintiff-appellant Sun City Taxpayers' Association ("SCTA") appeals from an order entered February 2, 1994 in the United States District Court for the District of Connecticut, Jose A. Cabranes, then-*Chief Judge*,[1] that dismissed SCTA's civil RICO claims because: (1) SCTA lacked standing to sue; (2) SCTA's claims were

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[1] Chief Judge Cabranes has since become a member of the United States Court of Appeals for the Second Circuit.

barred by the filed rate doctrine; and (3) SCTA's complaint failed to state a claim under RICO.

We affirm the order of the district court.

Background

SCTA is an Arizona not-for-profit corporation whose primary purpose, as stated in its articles of incorporation, is:

> To investigate, obtain data, study, and determine the fairness and reasonableness of . . . utility charges . . . which may be, or proposed to be, either imposed, levied, assessed, charged, or contracted, by . . . utilities . . . affecting property owners or residents of Sun City, [Arizona,] and to take whatever legal action is deemed fair, reasonable, and otherwise equitable.

Although all ratepayers of Sun City presumably benefit from SCTA's participation in rate-setting procedures, SCTA's membership does not include all present or past ratepayers of Sun City.

Citizens Utilities Company ("CUC") is a Delaware corporation with its principal place of business in Stamford, Connecticut. Sun City Water Company and Sun City Sewer Company (the "Utilities"), which provide water and sewage services to the residents of Sun City, Arizona, are wholly owned subsidiaries of CUC. CUC conducted all rate-setting and related activities on behalf of the Utilities during the years in question.

The Arizona Corporation Commission (the "Commission") is vested by article 15, § 3 of the Arizona Constitution with "full power to . . . prescribe . . . just

and reasonable rates and charges to be made and collected, by public service corporations within the State for service rendered therein . . . ." SCTA asserts that between 1968 and 1978, CUC perpetrated a "highly complex accounting fraud" that misrepresented to the Commission the actual operating costs incurred by the Utilities. It is claimed that CUC thus induced the Commission to increase public utility rates by approximately $65 million, which allegedly was paid to CUC as dividends. SCTA intervened in those rate-making proceedings, and now contends that both it and the Commission were misled by CUC's fraudulent representations, resulting in unlawful rate increases that harmed Sun City's residents.

SCTA brought suit against CUC under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, based upon CUC's alleged misrepresentations to the Commission both on the Utilities' books and in rate-setting applications. SCTA claims that CUC used the United States mails, interstate telephone calls and telecopier transmissions, and other interstate wire facilities to perpetrate the fraud and thereby obtain approval for excessive utility rates in violation of 18 U.S.C. §§ 1341 (mail fraud) and 1343 (wire fraud). The complaint further alleges that the predicate acts of mail and wire fraud form a pattern of racketeering activity, 18 U.S.C. §§ 1961(1)(B), 1961(5), and constitute violations of 18 U.S.C. § 1962(a), (b), and (c). Consequently, SCTA sought treble damages and attorney fees, as authorized by 18 U.S.C. § 1964(c).

CUC argued below that SCTA lacked standing to bring suit, that the filed rate doctrine bars private RICO actions against regulated utilities based upon alleged fraud in the rate-setting process, and that SCTA's com-

plaint failed to state a RICO claim. The district court so ruled in a comprehensive opinion.

This appeal followed.

Discussion

A. *Standing to Sue.*

Chief Judge Cabranes concluded that SCTA lacked standing to sue in this case, and we agree with that determination. The district court correctly noted that the postulated injury to SCTA's members did not "adversely affect [their] associational ties." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). SCTA's complaint does not allege that its associational ties with its members have been injured or impaired, but rather focuses solely upon the direct injury to Sun City's residents.

Accordingly, Chief Judge Cabranes analyzed SCTA's standing under the test of *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). Under *Hunt*, even in the absence of injury to its members' associational ties, an organization has standing to sue on behalf of its members if: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit." *Id.* at 343; *see also Warth*, 422 U.S. at 511 (even in absence of injury to itself, association may have standing solely as representative of its members); *Rent Stabilization Ass'n v. Dinkins*, 5 F.3d 591, 596 (2d Cir. 1993) (stating and applying *Hunt* test).

With regard to the third prong of the *Hunt* test, the Supreme Court has explained that an organization lacks standing to sue for money damages on behalf of its members if "the damage claims [of the members] are not common to the entire membership, nor shared by all in equal degree," so that "both the fact and extent of injury would require individualized proof." *Warth*, 422 U.S. at 515-16. The district court concluded, and we agree, that SCTA fails the third prong of the *Hunt* test because recovery in this case would require individualized proof by Sun City's residents.

The complaint describes a ten-year period of RICO violations perpetrated through a complex accounting fraud scheme. Presumably, not all of SCTA's members today were living in Sun City during 1968-1978, and each resident's injuries during that period would differ depending upon the amount of utility services consumed and the uses to which those services were put. Consequently, the individual members would be required as parties if this lawsuit were allowed to proceed, and SCTA has no standing to proceed in their absence.

B. *The Filed Rate Doctrine.*

Chief Judge Cabranes also addressed the filed rate doctrine,[2] which this court has more recently considered in *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17 (2d Cir. 1994). This doctrine provides an additional basis for dismissal in this case. As we said in *Wegoland*:

> The filed rate doctrine bars suits against regulated utilities grounded on the allegation that the rates

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[2] The district court's ruling that SCTA failed to state a RICO claim was essentially derivative from its determinations that (1) SCTA lacked standing, and (2) the filed rate doctrine barred any RICO claim.

> charged by the utility are unreasonable. Simply stated, the doctrine holds that any "filed rate"—that is, one approved by the governing regulatory agency—is per se reasonable and unassailable in judicial proceedings brought by ratepayers.

Id. at 18. *Wegoland*, like the present case, involved RICO claims, but the filed rate doctrine has been applied in numerous other contexts. *See, e.g., Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417, 423-24 (1986) (antitrust); *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 584-85 (1981) (breach of contract); *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251-53 (1951) (fraud); *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 162-65 (1922) (antitrust).

Wegoland was decided after the filing of briefs on this appeal, but prior to oral argument. *Wegoland* ruled that RICO claims premised upon alleged fraud perpetrated by utilities upon a rate-setting agency are barred by the filed rate doctrine. 27 F.3d at 20-22; *accord*: *Taffet v. Southern Co.*, 967 F.2d 1483, 1494-95 (11th Cir.) (in banc), *cert. denied*, 113 S. Ct. 657 (1992); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 488-92 (8th Cir.), *cert. denied*, 112 S. Ct. 2306 (1992). The fundamental problem is that "only by determining what would be a reasonable rate absent the fraud could a court determine the extent of the damages. And it is this judicial determination of a reasonable rate that the filed rate doctrine forbids." *Wegoland*, 27 F.3d at 21.

Wegoland requires affirmance in this case. SCTA attempts to distinguish itself from the "casual plaintiff" in *Wegoland* on the basis that SCTA is a consumer advocacy group whose sole purpose is "to monitor and enforce, through litigation if necessary, the rights of res-

idents and property owners in Sun City to be burdened by no more than fair and appropriate utilities charges." The effort is unavailing.

Wegoland was not brought by a "casual plaintiff," but rather, as a putative class action that purported to represent the interests of all injured ratepayers. In any event, the filed rate doctrine exists for reasons independent of the type of plaintiff maintaining the action: (1) legislatively appointed regulatory bodies have institutional competence to address rate-making issues; (2) courts lack the competence to set utility rates; and (3) the interference of courts in the rate-making process would subvert the authority of rate-setting bodies and undermine the regulatory regime. *Wegoland*, 27 F.3d at 21.

SCTA's goal of vindicating consumer rights simply does not implicate any of the considerations underlying the filed rate doctrine. *See id.* at 22 ("the class action nature of the proceeding in no way affects the important concerns of agency authority, justiciability, and institutional competence"). Thus, we recognized in *Wegoland*, as we do today, that the filed rate doctrine "applies whether or not the plaintiffs are suing for a class," *id.*, and regardless of the plaintiff's motivations in maintaining the litigation.

Moreover, while SCTA purports to represent the rights of all Sun City residents, there is no contractual or statutory vehicle for the equitable payment of any recovery to all affected Sun City ratepayers. *Cf. Holmes v. Securities Investor Protection Corp.*, 112 S. Ct. 1311, 1318 (1992) (criticizing claims that "would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the viola-

tive acts"); *Keogh*, 260 U.S. at 163 ("Uniform treatment would not result, even if all [victims] sued, unless the highly improbable happened, and the several juries and courts gave each the same measure of relief.").

Conclusion

The order of the district court is affirmed.

APPENDIX B

OPINION OF THE DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

SUN CITY TAXPAYERS' ASSOCIATION	:	
v.	:	Civil No. 3:93-CV-364 (JAC)
CITIZENS UTILITIES COMPANY	:	

Appearances:

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RULING ON DEFENDANT'S MOTION TO DISMISS

JOSÉ A. CABRANES, Chief Judge:

This is an action by the Sun City Taxpayers' Association ("Association"), an Arizona not-for-profit corporation, claiming to represent residential real estate owners in Sun City, Arizona. The Complaint (filed Feb. 19, 1993) ("Complaint") alleges that Citizens Utilities Company ("Utilities"), a Delaware corporation with its principal place of business in Stamford, Connecticut, was involved in a

scheme to submit false information to the Arizona Corporation Commission ("Arizona Commission"), Arizona's utility rate-setting authority, in order to secure approval of higher-than-proper utility rates.

The court's jurisdiction is invoked pursuant to 28 U.S.C. §1331 (federal question jurisdiction) and the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §1961 *et seq.* ("RICO"). Pending before this court is the defendant's motion to dismiss the Complaint.

BACKGROUND

The Association alleges that on two or more occasions Utilities used the United States Postal Service, interstate telephone calls, telecopier transmissions and other interstate wire facilities in furtherance of a scheme to defraud, in violation of section 1341 (mail fraud) and section 1343 (wire fraud) of Title 18 of the United States Code. According to the Association, Utilities' alleged actions constitute predicate acts of "racketeering activity" as defined by 18 U.S.C. §1961(1)(B) and form a "pattern of racketeering activity" as defined by 18 U.S.C. §1961(5).

The Complaint alleges that between 1968 and 1978, the defendant caused fraudulent statements to be entered on the accounting books of its subsidiaries, Sun City Water Company and Sun City Sewer Company (water and sewer service providers for Sun City), in order to procure from the Arizona Commission higher utility rates than it would otherwise have been entitled to secure. Complaint, ¶14. The plaintiff seeks, *inter alia,* treble damages, costs and attorney's fees under 18 U.S.C. §1964(c), based on the alleged violations of subsections (a), (b), and (c) of §1962. Complaint, ¶¶30-32; p. 22.

The defendant has moved to dismiss the Complaint (1) pursuant to Fed. R. Civ. Pro. 9(b), for failure to plead

fraud with particularity, and (2) pursuant to Fed. R. Civ. Pro. 12(b)(6), for failure to state a claim upon which relief can be granted. The defendant contends that even if the allegations in the Complaint were deemed to be pleaded with the requisite particularity, and even if all of the allegations are true, the plaintiff cannot maintain this action because: (1) the Association lacks standing, (2) the "Filed Rate Doctrine" bars the plaintiff's cause of action, and (3) the Complaint fails to state a cognizable RICO claim.[1] Following the filing of a response to this motion by the Association and a reply memorandum by Utilities, the court heard oral argument on the defendant's motion at a hearing held on the record in open court on October 4, 1993. Accordingly, the defendant's motion is now ripe for consideration and decision by the court.

DISCUSSION

I.

In deciding a motion to dismiss, a court must presume all factual allegations in the complaint to be true and must draw any reasonable inferences in favor of the non-moving party. *See* 2A Moore's Federal Practice ¶12.07 (2d ed. 1991); *See, e.g., Cruz v. Beto,* 405 U.S. 319, 322 (1972); *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Yoder v. Orthomolecular Nutrition Inst., Inc.,* 751 F.2d 555, 562 (2d Cir. 1985). In an action arising under RICO, any supplemental facts provided in a RICO case statement are likewise taken as true. *McLaughlin v. Anderson,* 962 F.2d 187, 189 (2d Cir. 1992). Dismissal is not warranted unless "it appears beyond all doubt that the plaintiff can prove no set of facts in support of the claim which would entitle him to relief." *Conley,* 355 U.S. at 45-46. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence

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[1] Defendant's Memorandum in Support of Motion to Dismiss Complaint (filed Apr. 19, 1993) ("Defendant's Memorandum") at 1-3.

to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *De La Cruz v. Tormey*, 582 F.2d 45, 48 (9th Cir. 1978), *cert. denied*, 441 U.S. 965 (1979). The question for this court to decide is "whether or not it appears to a certainty under existing law that no relief can be granted under any set of facts that might be proved in support of the plaintiff[']s[] claims." *Id.*

A. **Standing**

We begin with the question of whether the plaintiff has standing to bring this action. It is, of course, the general rule that a party must establish a personal stake in the action in order to invoke federal jurisdiction. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 501 (1975); *United States v. SCRAP*, 412 U.S. 669, 687 (1973).

Although an organization does have standing to sue in its own right to seek relief from injury to itself, *see Warth*, 422 U.S. at 511, organizations do not have standing to represent their vision of the public interest, their "interest in a problem" or "their own value preferences" absent some asserted injury to the organization or to its members. *Sierra Club v. Morton*, 405 U.S. 727, 736-41 (1972); *SCRAP*, 412 U.S. at 683-87; *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 & n.22 (1982); *see also Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223 n.13 (1974); *Sullivan v. Syracuse Housing Authority*, 962 F.2d 1101, 1107 (2d Cir. 1992); *Matter of Appointment of Independent Counsel*, 766 F.2d 70, 73-74 (2d Cir. 1985), *cert. denied*, 474 U.S. 1020 (1985) ("*Independent Counsel*").

In attempting to "secure relief from injury to itself the association may assert the rights of its members, *at least so long as the challenged infractions adversely affect its members' associational ties.*" *Warth*, 422 U.S. at 511 (emphasis added); *see also N.A.A.C.P. v. Alabama*, 357 U.S.

449, 458-60 (1958) (organization had standing to assert the rights of its members not to disclose their membership, because requiring members to assert their right not to disclose their membership nullified the right at the moment of assertion); *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 186-87 (1951) (Jackson, J., concurring). In this case the Association has neither alleged an injury to itself nor alleged that its members' associational ties have been affected. *See, e.g.*, Certified Official Transcript of October 4, 1993 Hearing (filed Oct. 13, 1993) ("Transcript") at 46-47. The Association does not claim that it paid the alleged higher utility rates. *Id.* Moreover, while the Association claims to be protecting the pecuniary interest of its members, it does not explain how the alleged overpayment of utility rates by its members affects the members' "associational" ties. *Id.*

Nevertheless, an organization that has not suffered an injury itself can sue as the representative of its members if "(a) its members would otherwise have standing to sue in their own right; (b) the interest it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of the individual members in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977). But as the Supreme Court stated in *Warth* and *Hunt*, whether an organization has standing as the representative of its members depends substantially upon the type of relief sought:

> If in a proper case the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured. Indeed, in all cases in which we have expressly recognized standing in associations to represent their members, the relief sought has been of this kind.

Id. at 343 (quoting *Warth*, 422 U.S. at 515).

The Association meets the first two requirements of the *Hunt* test. First, each of the Association's members has standing to bring this action in his or her own right because each member has allegedly suffered a "distinct and palpable injury," *Warth*, 422 U.S. at 501, as a result of the alleged "illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), which could be redressed by a favorable court decision. *Independent Counsel*, 766 F.2d at 74 (*citing Valley Forge*, 454 U.S. at 472). Second, the interests the Association seeks to protect are germane to the organization's purpose—one of the purposes of the Association is to investigate and determine the fairness and reasonableness of utility charges.[2]

However, the Association fails to meet the third part of the *Hunt* test because the relief requested requires that each member of the Association be a party to the suit. In *Warth*, the Supreme Court found that an organization did not have standing to represent its members' interest because the damages claimed were not common to the entire membership, nor shared in equal degree by them. Since each member's injuries were peculiar to that member, and "individualized proof" would be required to prove both the fact and extent of the injuries, each member would necessarily have to be a party to the suit. *Warth*, 422 U.S. at 515-16; *see also Hunt*, 432 U.S. at 344 (organization had standing to represent its members because the request for declaratory and injunctive relief did *not* require individualized proof). The alleged injuries suffered by the Association's members are peculiar to each member; individualized proof would be required both as to whether the member was injured and the extent of any such injury. The Association's members have lived in Sun City for

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[2] Plaintiff's Memorandum of Law in Opposition To Defendant's Motion to Dismiss (filed May 17, 1993) ("Plaintiff's Response") Exhibit A at 1 (the Association's articles of incorporation).

varying lengths of time and, if they have suffered any injury, they presumably have suffered varying degrees of injury. In addition, their injuries would vary according to their use of the utility service. Even if the members injuries could be calculated by a simple formula, that alone would be insufficient to grant the organization standing. *Hunt*'s requirement of "individual participation" implies "something more than individual in-court testimony to establish the fact and extent of injury" *Telecommunications Research & Action Ctr. on Behalf of Checknoff v. Allnet Communication Services, Inc.*, 806 F.2d 1093, 1095 (D.C. Cir. 1986) (Ruth Bader Ginsberg, J.) ("*Allnet*") (An association lacked standing to pursue an action for damages on behalf of its members even though the extent of the injury to each individual could be easily calculated).

Furthermore, the Association is not seeking any kind of prospective relief, but only damages. Courts have consistently rejected assertions of representative standing on behalf of their members where the association has sought damages as opposed to injunctive or declaratory relief. *See, e.g., Warth*, 422 U.S. at 515; *United Union of Roofers, Waterproofers, and Allied Trades No. 40 v. Insurance Corp. Of America*, 919 F.2d 1398, 1400 (9th Cir. 1990); *Allnet*, 806 F.2d at 1095; *American Fed'n of R.R. Police, Inc. (AFRP) v. National R.R. Passenger Corp. (AMTRAK)*, 832 F.2d 14, 16 (2d Cir. 1987); *Simer v. Rios*, 661 F.2d 655, 682 & n.57 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982); *United Steelworkers of America, AFL-CIO v. University of Alabama*, 599 F.2d 56, 59 (5th Cir. 1979); *Cf. Hunt*, 432 U.S. at 344 (noting that the plaintiff requested only declaratory and injunctive relief, which did *not* require individualized proof).

The plaintiff draws the court's attention to *Middlewest Motor Freight Bureau v. United States*, 525 F.2d 681, 682-83 (8th Cir. 1975), a pre-*Hunt* case, to support its contention that courts have found that organizations can have representative standing when seeking damages on behalf of their members.

Plaintiff's Response at 39-40. Even if it could be argued that *Middlewest* is still good law in the Eighth Circuit after *Hunt*—a dubious proposition—it would not bind a court in our Circuit.[3] *Middlewest* is, in any event, distinguishable. In that case, the Eighth Circuit found strong "prudential considerations" for granting standing to an association that had litigated the merits of the case for over 10 years without a challenge to its standing. *Middlewest,* 525 F.2d at 583. In addition, denying standing would have prejudiced the individual members because they would have been barred by the statute of limitations from bringing their own claims. *Id.* Contrary to the plaintiff's contention in the instant case, Plaintiff's Response at 40 n.11, the court finds that neither of these "prudential considerations" are present here. This action is new and has not been litigated for any length of time; the defendant has contested the plaintiff's standing at an early stage in the proceedings; and the plaintiff has not cited any statute of limitations that would bar the individual members from asserting these claims.

The Association's reliance on *Standardbred Owners Ass'n v. Roosevelt Raceway Associates, L.P.*, 985 F.2d 102 (2d Cir. 1993), is similarly misplaced. In *Standardbred,* the plaintiffs consisted of the individual members of an association and the association to which they belonged; the association asserted its claims on the basis of injuries it had suffered and not as the representative of its individual members. In that case the Court of Appeals found that the plaintiffs had demonstrated that the asserted RICO violation was the proximate cause of the plaintiffs' injuries, thereby satisfying RICO's independent standing requirement. *Standardbred,* 985 F.2d at 104-05; *see Holmes v. Securities Investor Protection Corp.*,

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[3] *Cf.* Transcript at 44 (the plaintiff concedes absence of Second Circuit authority for its position).

___ U.S. ___, 112 S.Ct. 1311, 1316-19 (1992); *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 23-24 (2d Cir. 1990). In the present case, the court is called upon to determine whether the plaintiff meets the general standing requirement of a distinct and palpable injury, not whether the plaintiff has met the independent standing requirement of RICO, 18 U.S.C. §1964(c). *See Holmes*, ___ U.S. ___, 112 S.Ct. at 1316-18.

The court concludes, for the reasons stated above, that the plaintiff lacks standing and that this action must be dismissed.

II.

Assuming for the argument only that the plaintiff is able to meet general standing and pleading requirements,[4] we turn to the defendant's argument that the action should be dismissed pursuant to Fed. R. Civ. Pro. 12(b)(6), for failure to state a claim upon which relief can be granted.

A. **RICO Claim**

To invoke civil RICO remedies under 18 U.S.C. §1964(c), the plaintiff must allege that he was "injured in his business or property by reason of a violation of section 1962."[5] Accordingly, the plaintiff must show (1) a violation of section 1962, (2) an injury to business or property and (3) that the RICO violation was the proximate cause of the plaintiff's

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[4] In the circumstances presented, the court need not, and does not, address the question of whether the plaintiff, has met the requirements of Fed. R. Civ. P. 9(b) that allegations of fraud be pleaded with particularity, *see generally McLaughlin*, 962 F.2d at 191, although at first blush it would appear to have done so.

[5] "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court...." 18 U.S.C. §1964(c).

injury. *See Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 496 (1985); *Hecht*, 897 F.2d at 23; *Holmes*, ___ U.S. ___, 112 S.Ct. at 1316-18; *Procter & Gamble Co. v. Big Apple Indus. Bldgs., Inc.*, 879 F.2d 10, 14-15 (2d Cir. 1989), *cert. denied*, 493 U.S. 1022 (1990).

The defendant contends that the plaintiff has not (1) established a violation of section 1962, (2) alleged facts showing an injury to the plaintiff's business or property, or (3) shown any causal relationship between the alleged violation and the alleged injury. *See* Defendant's Memorandum at 17-30. The court agrees that the Association has not alleged facts sufficient to establish that it has suffered an injury to its business or property. As noted above with regard to standing, the plaintiff has not alleged that it either paid the alleged excessive rates or that it has suffered an injury to its business or property as a result of the alleged excessive rates. *See Sedima*, 473 U.S. at 496 (a party cannot recover under RICO unless it has suffered an injury to its business or property). Furthermore, as explained more fully below, even if the Association had paid the allegedly excessive rates, its civil RICO claim would still be barred by the "filed rate doctrine." Accordingly, the court need not reach the question of whether the plaintiff has alleged facts sufficient to establish a violation of section 1962[6] or whether the violation could have been the proximate cause of the plaintiff's injuries.

B. **Filed Rate Doctrine**

Even if it could be argued that the plaintiff had general standing to bring this action, met the pleading requirements of

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[6] *See National Organization for Women, Inc. v. Scheidler*, 1994 WL 13716 (U.S. Jan. 24, 1994) ("*NOW v. Scheidler*") (explaining that section 1962 does not require proof that either the predicate acts of racketeering or the racketeering enterprise were economically motivated).

Fed.R.Civ.P. 9(b), and stated a claim under RICO, the court would be required to dismiss this action because it is barred by the "filed rate doctrine." That doctrine automatically prevents the plaintiff from meeting the specific standing requirements of section 1964(c) because the plaintiff cannot be said to have suffered an injury to its business or property.

In *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922),[7] Justice Brandeis enunciated the filed rate doctrine, which prevents a ratepayer from challenging the rates approved by a legislatively created agency or utility rate-setting scheme. The doctrine "forbids a regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); a ratepayer can "claim no rate as a legal right that is other than the filed rate...." *Montana-Dakota Utilities Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951). Therefore, the filed rate doctrine prohibits a ratepayer from recovering damages measured by comparing the filed rate and the rate that might have been approved absent the conduct in issue. *See Hall*, 453 U.S. at 577-79; *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir. 1992) ("*H.J.Inc. II*"), *cert. denied*, 112 S.Ct. 2306 (1992).

The purpose of the filed rate doctrine is to preserve the authority of the legislatively created agency to set reasonable and uniform rates and to insure that those rates are enforced, thereby preventing price discrimination. *See Hall*, 453

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[7] The origins of the "filed rate doctrine" can be traced to *Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 440-41 (1907) (denying a shipper's right to maintain a common law action against a common carrier for the exaction of alleged unreasonable rates, which were filed with the Interstate Commerce Commission). *Keogh* applied this concept to an action brought under a federal statute.

U.S. at 577-79 (allowing a state court to award breach of contract damages for rates never filed would undermine the congressional scheme of uniform rate regulation). "The duty to file rates with the Commission...and the obligation to charge only those rates,...have always been considered essential to preventing price discrimination and stabilizing rates." *Maislin Ind., U.S. Inc. v. Primary Steel, Inc.*, ___ U.S. ___, 110 S.Ct. 2759, 2766 (1990). " 'The considerations underlying the doctrine...are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant.' " *Hall*, 453 U.S. at 577-78 (quoting *City of Cleveland, Ohio v. Federal Power Commission*, 525 F.2d 845, 854 (D.C. Cir. 1976)).

Furthermore, the courts have recognized that judicial tribunals are not well suited to retroactive rate-setting in the face of a legislatively created rate-setting authority. *See Wegoland, Ltd. v. NYNEX Corp.*, 806 F.Supp. 1112, 1115 (S.D.N.Y. 1992). In *Montana-Dakota*, the parties (two electrical utility companies) agreed to the rates that each utility company would pay the other for electrical power, which were then filed with and approved by the Federal Power Commission. The plaintiff sought damages measured by the difference between the filed rate and the rate that would have been established absent the alleged fraud in the setting of the rate. *Montana-Dakota*, 341 U.S. at 251-55. The Supreme Court, though not explicitly referring to *Keogh* or the filed rate doctrine, went on to explain:

> [T]he problem is whether it is open to the courts to determine what the reasonable rates during the past should have been. The petitioner, in contending that they are so empowered...regard[s] reasonableness as a justiciable legal right rather than a criterion for administrative application in determining a lawful rate....It is not the disembodied "reasonableness" but

> that standard when embodied in a rate which the Commission accepts or determines that governs the rights of buyer and seller. A court may think a different level more reasonable. But the prescription of the statute is a standard for the Commission to apply and, independently of Commission action, creates no right which courts may enforce.
>
> Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate....

Montana-Dakota, 341 U.S. at 251; *see also Taffet v. Southern Co.*, 967 F.2d 1483, 1489-90 (en banc) (11th Cir. 1992) ("Taffet II"), *cert. denied*, 113 S.Ct. 657 (1992); *Wegoland*, 806 F.Supp at 1114-15.

The filed rate doctrine has traditionally been applied in actions brought under the Sherman Antitrust Act, 15 U.S.C. §§ 1-7. *See, e.g., Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986); *Keogh*, 260 U.S. 156; *City of Kirkwood v. Union Elec., Co.*, 671 F.2d 1173 (8th Cir. 1982) (Richard S. Arnold, J.), *cert denied*, 459 U.S. 1170 (1983). However, the doctrine has also been applied to bar RICO claims. *See H.J.Inc. II*, 954 F.2d 485 (filed rate doctrine barred customers' civil RICO action against telephone company for an alleged scheme to bribe members of the rate-setting commission in order to influence rate setting); *Taffet II*, 967 F.2d at 1485-86 (filed rate doctrine barred ratepayer civil RICO action against an electrical utility to recover excessive rates resulting from the utility's fraudulent misrepresentations to the rate-setting commission); *Wegoland*, 806

F.Supp. at 1112-13 (filed rate doctrine barred ratepayers' civil RICO action against telephone utility for excessive rates obtained through fraud of the regulatory commission); *Lifschultz Fast Freight, Inc. v. Consolidated Freightways Corp. of Delaware,* 805 F.Supp. 1277, 1296 (D.S.C. 1992), *aff'd without opinion,* 998 F.2d 1009 (4th Cir. 1993), *cert. denied,* 114 S.Ct. 553 (1993) (filed rate doctrine barred the plaintiff's RICO claims). Although the seminal *Keogh* case involved a federal regulatory agency, the rationale behind the filed rate doctrine applies equally to state agencies. *See H.J.Inc. II,* 954 F.2d at 494; *Taffet II,* 967 F.2d at 1494; *Wegoland,* 806 F.Supp. at 1115.

This case presents the court with precisely the situation the filed rate doctrine was intended to avoid. The Arizona Constitution vests the Arizona Commission with "full power to...prescribe...just and reasonable rates and charges to be made and collected, by public service corporations within the State for service rendered therein.... *See* Ariz. Rev. Stat. Ann., Ariz. Const. art. 15 § 3. *See Arizona Corp. Commission v. Woods,* 171 Ariz. 286, 292-94 (1992) (explaining the extent of power to set rates vested in the Arizona Commission by the Arizona Constitution); *State v. Tucson Gas, Electric Light & Power Co.,* 15 Ariz. 294, 302 (1914) (describing the power given to the Arizona Commission as "*sui generis*"). Under section 2 of article 15 of the Arizona Constitution, "[a]ll corporations other than municipal [corporations] engaged in furnishing [public utility services]...shall be deemed public service corporations." *Mountain States Tele. and Tele. Co. v. Arizona Corp. Commission,* 132 Ariz. 109, 114 (Ariz. App. 1982) (quoting Ariz. Rev. Stat. Ann., Ariz. Const. art. 15 § 2); *Cf. Arizona Public Service Co. v. Arizona Corp. Commission,* 155 Ariz. 263, 266-67 (App. 1987) *opinion approved in part and vacated in part,* 157 Ariz. 532 (1987) (parent of a wholly-owned public service corporation was not itself a public service corporation within the jurisdiction of the Arizona Commission).

Arizona courts have interpreted section 3 of article 15 as giving the Arizona Commission full and exclusive power to set rates which cannot be interfered with by the courts, the legislature or the executive of the state government. *See Morris v. Arizona Corp. Commission,* 24 Ariz. App. 454, 457 (1975); *Ethington v. Wright,* 66 Ariz. 382, 391-92 (1948). The Arizona Commission has a "range of legislative discretion" in setting rates and as long as that discretion is not abused, the state courts cannot substitute their judgment for that of the commission as to what "is fair value or a just and reasonable rate." *Woods,* 171 Ariz. at 294; *Simms v. Round Valley Light & Power Co.,* 80 Ariz. 145, 154 (1956). In fact, a state trial court's review of the Arizona Commission's rate-making power is limited to whether its findings and conclusions are supported by substantial evidence and are not arbitrary or otherwise unlawful. *Simms,* 80 Ariz. at 154; *Arizona Corp. Commission v. Citizens Utilities Co.,* 120 Ariz. 184, 187 (Ariz. App. 1978).

In the instant case, the Arizona Commission approved the rates at issue; the Association is attacking the reasonableness of the rates established by the Arizona Commission, and asking the court to award damages in the amount by which the rates allegedly were excessive. Were the court to determine that the rates at issue in the instant case were improperly set, the court would necessarily have to second guess and alter the rates established by the Arizona Commission; any award of damages would in effect reset the prior rates to a level the court deemed appropriate. Furthermore, any award of damages, unless enuring to the benefit of all past ratepayers, would result in the unjust price discrimination which the legislature wanted to avoid. *Cf. Taffet II,* 967 F.2d at 1490-95. It bears recalling that the Association's membership does not include all present or past ratepayers in Sun City. Transcript at 39-40.

Moreover, under the filed rate doctrine, the plaintiff cannot support a claim under section 1964(c) because it has

not suffered an injury to its "business or property." As Justice Brandeis explained in *Keogh*:

> Section 7 of the Anti-Trust Act gives a right of action to one who has been "injured in his business or property." Injury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier. And they are not affected by the tort of a third party. This stringent rule prevails, because otherwise the paramount purpose of Congress—prevention of unjust discrimination—might be defeated.

Keogh, 260 U.S. at 163) (citations omitted); *Square D Co.*, 476 U.S. at 416-17 (quoting *Keogh*). As Justice Brandeis suggested, a ratepayer cannot suffer an injury to his "business or property" under the Antitrust Act if he pays the filed rate, even if that rate is obtained through fraud. *Taffet II*, 967 F.2d at 1495.

Likewise, a plaintiff cannot suffer an injury to his business or property under RICO if he pays the filed rate. Section 1964(c) provides a civil remedy for any person who is "injured in his business or property by reason of a violation of section 1962" of RICO. 18 U.S.C. §1964(c); *see also NOW v. Scheidler*, 1994 WL 13716 at 4. In interpreting the meaning of section 1964(c), the Supreme Court has stated that it credits "the 91st Congress, which enacted RICO, with knowing the interpretation federal courts had given the words earlier Congresses had used first in § 7 of the Sherman Act, and later in the Clayton Act's § 4." *Holmes*, 112 S.Ct. at 1317-18 (citations omitted) (interpreting section 1964(c) as incorporating the antitrust requirement of proximate cause). "It used the same

words, and we can only assume it intended them to have the same meaning that courts had already given them." *Id.* (citations omitted).

Accordingly, the plaintiff cannot maintain a civil Rico action if he paid the filed rate. The Complaint does not allege, and the plaintiff nowhere else suggests, that Utilities ever charged anything other than the legal filed rate established by the Arizona Commission. Therefore, as *Keogh* and *Holmes* makes clear, neither the Association nor its members have standing to bring this RICO claim because they have paid the legal rate approved by the Arizona Commission and consequently they have not been injured in their property or business.

The plaintiff relies on *County of Suffolk v. Long Island Lighting Co.*, 907 F.2d 1295, 1307-08 (2d Cir. 1990) ("*LILCO*") for the proposition that the filed rate doctrine does not bar its claim. While our Court of Appeals clearly and unambiguously stated in *LILCO* that RICO is applicable to state regulated utilities, it did not comment on whether the filed rate doctrine would bar a civil RICO claim by a ratepayer or association of ratepayers. *H.J.Inc. II*, 954 F.2d at 491; *Wegoland*, 806 F.Supp. at 1122. If the filed rate doctrine does not shield utilities from all possible RICO actions, it surely bars civil recovery under RICO by ratepayers. As Justice Brandeis explained in *Keogh*, the filed rate doctrine bars a private party from bringing a civil action under the Antitrust Act, but it does not bar *the Government* from bring an action against the defendant. *Keogh*, 260 U.S. at 162. As a result, the filed rate doctrine does not completely immunize utilities from the antitrust laws; they remain subject to actions brought by the Government for criminal sanctions and other equitable relief. *Square D Co.*, 476 U.S. at 422. Similarly, the filed rate doctrine would not, as the plaintiff suggests, immunize utilities completely from RICO—they would remain subject to suits brought by the Government under RICO because the filed rate doctrine bars only a ratepayer's private civil RICO remedy.

The plaintiff also relies on *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) for the proposition that the filed rate doctrine does not bar the plaintiff's RICO claim. *See* Plaintiff's Response at 17-20. However, the plaintiff's reliance on the Supreme Court's decision in *Northwestern Bell* is misplaced. In that case, the Court reversed the decision in *H.J.Inc. v. Northwestern Bell Tel. Co.*, 829 F.2d 648 (8th Cir. 1987) (en banc) ("*H.J.Inc. I*"), which had affirmed the district court's dismissal, *see* 648 F.Supp. 419 (D.Minn. 1986), of a ratepayers' civil RICO claim against the utility due to a failure to plead sufficiently a pattern of racketeering; a failure to allege an "enterprise" distinct from the "racketeer"; and the filed rate doctrine. The Court of Appeals affirmed solely on the "pattern" question; it did not address the other two grounds. *H.J.Inc. I*, 829 F.2d at 650; *see Northwestern Bell*, 492 U.S. at 234 & n.1. The Supreme Court in *Northwestern Bell* found that the plaintiffs had adequately pled a pattern of racketeering, but the Court (like the Court of Appeals before it) did not address the issue of whether the filed rate doctrine barred the plaintiffs' RICO claims.

The Association also argues that the cases that have barred RICO claims under the filed rate doctrine are distinguishable. *See* Plaintiff's Response at 25. The plaintiff implies that there is an exception to the filed rate doctrine where there is an allegation that the defendant committed fraud on the rate-setting agency. *See id.* at 17, 20. The Association argues that the filed rate doctrine should not apply here because, in obtaining approval of the utility rates, Utilities defrauded the Arizona Commission. The Supreme Court has not decided whether there is a fraud exception to the filed rate doctrine. *See Hall*, 453 U.S. at 583 & n.13 (the Court reserved "for another day the question whether the filed rate doctrine applies in the face of fraudulent conduct"). However, other courts have refused to recognize a fraud exception to the filed rate doctrine. As the Court of Appeals stated in a leading case,

"the underlying conduct does not control whether the filed rate doctrine applies. Rather, the focus for determining whether the filed rate doctrine applies is the impact the court's decision will have on agency procedures and rate determinations." *H.J.Inc. II,* 954 F.2d at 489 & n.4; *accord, Taffet II,* 967 F.2d at 1494-95 (court rejects proposition that fraud is exception to the filed rate doctrine); *Wegoland,* 806 F. Supp. at 1118 (same). In light of the Supreme Court's re-affirmation of the filed rate doctrine in *Square D Co.,*[8] and the persuasive authority of these decisions of the lower federal courts, this court declines the plaintiff's invitation to find a fraud exception to the filed rate doctrine.

CONCLUSION

Upon a review of the record, including the arguments of counsel on November 4, 1993, and for the reasons stated above, the defendant's motion to dismiss the Complaint (Doc. No. 16) is hereby GRANTED.

It is so ordered.

Dated at New Haven, Connecticut, this 1st day of February, 1994.

/s/ José A. Cabranes

José A. Cabranes
Chief Judge

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[8] *Square D Co.,* 476 U.S. at 424 (if the *Keogh* rule is to be overruled, "it must come from Congress, rather than from this Court").